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NO. 82-77

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

WILLIAM N. GRIFFIN, et al.,
Appellants,

vs.

BURNES E. SIMS, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rule 16, hereby move that the decision and judgment of the Supreme Court of Georgia in this case, reported as *Sims, et al v. Town of Baldwin, et al*, 249 Ga. 293, 290 S.E.2d 433, (April 21, 1982), be affirmed, or that the appeal be dismissed, on the ground that the appeal does not present a substantial federal question.

STATEMENT

The question presented in this case is the constitutionality of a local amendment to the Constitution of Georgia of 1976, authorizing the levy of an excise tax on malt and other alcoholic beverages in Habersham County, Georgia, for local educational purposes (Ga. Laws 1980 Vol. I, p. 2280), as against a claim that limiting the tax to this one county violates equal protection of the laws. Any tax levied under this amendment will be in addition to the uniform tax levied by the State itself.

Under Georgia law, the sale of distilled spirits, i.e., whiskey and other beverages containing over 21% alcohol, Ga. Code §5A-102(8), is illegal except where the sale thereof in a given county or municipality has been authorized under a local option election held in the county or municipality. Ga. Code §5A-2301 et seq. Separate elections are required to authorize sales by the drink. Ga. Code §5A-2901 et seq. State license taxes are imposed on wholesalers and retailers, Code §5A-2501, and an excise tax is imposed on the intoxicating beverages themselves. Ga. Code §5A-2701 et seq. Where sales by the drink have been authorized by a county or city, the governing authorities thereof may also impose an excise tax on each drink. Ga. Code §5A-2906 et seq.

In contrast, the sale of malt beverages may be authorized and licensed by the governing authority of a county or municipality without the necessity of a local referendum. Ga. Code §5A-4301 et seq. The state imposes an excise tax on such beverages, Code §5A-4701, and general law provides for a specified excise tax on such beverages by counties and muncipalities. Code §5A-4731. The licensing and sale of wine within counties and muncipalities is similar to that provided for malt beverages. See Ga. Code §5A-5101 et seq.

In this case, the sale of neither distilled spirits, nor malt beverages and wine, has been legalized within the unincorporated areas of Habersham County, in the manner prescribed by law just stated, but the sale of all or some of the beverages has been legalized within three municipalities located in the County, i.e., Clarkesville, Mt. Airy and Baldwin, part of the latter being located in Banks County (J.S. A15).

Two actions were brought in the superior court of

Habersham County by an individual, five liquor dealers, a beer wholesaler's association and the Towns of Mt. Airy and Baldwin, challenging the constitutionality of the local amendment under both the federal and state constitutions. The superior court held the amendment unconstitutional on two grounds: (1) The Act denies equal protection in that it "singles out Habersham County" without any reasonable ground for classification of this County alone (J.S. A21); (2) The amendment was illegal in that it was not voted on by the people state-wide, but only by the people of Habersham County, which the Court held was violative of the Georgia constitutional provision governing the procedure for ratification of constitutional amendments, Art. XII, Sec. I, Par. I (Code §2-6901) (J.S. A24).

The Supreme Court of Georgia reversed. *Sims, et al v. Town of Baldwin, et al*, 249 Ga. 293, 290 S.E.2d 433 (1982).

ARGUMENT

(1) The Questions Are Not Substantial

The questions presented here are clearly unsubstantial. A state law authorizing the imposition of a county tax on alcoholic beverages sold in one county of the state does not deny equal protection just because the law does not authorize the same tax in all of Georgia's other 158 counties. Indeed, this argument proves too much, for if extended to the limit of its logic, would destroy home rule for cities and counties, outlaw local legislation, and place in doubt the validity of Georgia's local option law under which the sale of alcoholic beverages is made legal in the various counties and muncipalities in the State. This Court has rejected the claim that the Equal Protection Clause guarantees territorial uniformity within a state.

Salsburg v. Maryland, 346 U.S. 545, 551, 98 L.Ed.2d 281 (1954); *McGowan v. Maryland*, 366 U.S. 420, 427, 6 L.Ed.2d 393 (1961); *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 230, 12 L.Ed.2d 256 (1964); *Hayes v. Missouri*, 120 U.S. 68, 71, 30 L.Ed. 578 (1887); *Bowman v. Lewis*, 101 U.S. 22, 30-31, 25 L.Ed. 989 (1880); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 28, n. 66, 54, 36 L.Ed.2d 16 (1973). "But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *McGowan v. Maryland*, supra. "A state, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature having in mind the needs and desires of each." *Griffin v. School Board of Prince Edward County*, supra. In this case, no *person* is denied the equal protection of the laws, for any person who buys the beverages in Habersham County pays the county tax, regardless of his residence. Nor is it material that at present the sale of such beverages has been authorized only within three muncipalities in the County and not in the unincorporated area of the County. To begin with, it must be obvious that it is not just citizens of these three cities who purchase the beverages, and it is therefore clear that revenues derived from sales to *all buyers*, regardless of their residence, are used to support the schools in Habersham County, which also benefits the citizens of these three cities. Second, taxes are not unconstitutional because the benefits are unevenly shared. *Thomas v. Gay*, 169 U.S. 264, 278, 42 L.Ed. 740 (1898); *Wagoner v. Evans*, 170 U.S. 588, 592, 42 L.Ed. 1154 (1898); *Southern Pacific Co. v. Kentucky*, 222 U.S. 63, 76, 56 L.Ed. 96 (1911); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S.

495, 523, 81 L.Ed. 1245 (1937).

Granted that the Georgia Supreme Court below held that a territorial classification is *per se* valid [1] as asserted by Appellants (J.S. 10), it is a sufficient answer to say that the decisions of this Court cited first above herein bear this out,[2] and in any event, the holding of the Georgia Court must be tested in the context of the factual situation in which it was made, and not as an abstract proposition, for this Court reviews the judgment below, not the opinion. 28 USCA 1257 (2); *Bank of Commerce v. Tennessee*, 163 U.S. 416, 420, 41 L.Ed. 211 (1896).

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[1] What the Georgia Supreme Court held was: "If a local amenment is otherwise valid under Code Ann. §2-6901, there can be no claim that the amendment violates equal protection of the laws because it classifies a county in a manner different from other counties in the state. By local ordinances or pursuant to the authority of the County Home Rule Amendment, a county may classify itself in a manner different from all other counties in the state. The fact that County A authorizes the sale of liquor while County B does not does not mean that County B has been denied equal protection of the laws." (J.S. A6)

[2] The Georgia Constitution does contain a provision requiring some degree of territorial uniformity, Art. I, Sec. II, Par. VII (Code §2-207), which declares that, "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by existing general law." Under this provision, municipal character provisions and local laws governing specific county governments are permissible except to the extent that general laws may deal with the subject. The Georgia Constitution also recognizes a large degree of Home Rule authority by cities and counties. Art. IX, Sec. II, Par. I (Code §2-5901). The local constitutional amendment in this case, which provides an alcoholic beverage tax for support of education in Habersham County, was necessary in order to circumvent a state constitutional provision declaring that local support of education generally is to be derived from a local ad valorem tax. Constitution, Art. VIII, Sec. VII, Par. I (Code §2-5501). Burdensome ad valorem property taxes attributable to inflation have been a significant political issue in Georgia for several years. The constitutional amendment here in dispute was accompanied by another amendment ratified at the same time which provided ad valorem tax relief for old and disabled persons. Ga. Laws 1980 Vol. I, p. 2283. See also 249 Ga. 293.

(2) The Validity Of Georgia Law Is Also Supported By The Twenty-First Amendment

While "state liquor regulatory schemes cannot work invidious discriminations that violate the Equal Protection Clause", *Craig v. Boren*, 429 U.S. 190, 208, 50 L.Ed. 2d 397 (1976), it is clear that the "case for upholding state regulation in the area covered by the Twenty-First Amendment is undoubtedly strengthened by that enactment." *California v. LaRue*, 409 U.S. 109, 115, 34 L.Ed. 2d 342 (1972). See also, *Seagram & Sons v. Hostetter*, 384 U.S. 35, 42, 16 L.Ed.2d 336 (1966). Certainly, in the context of a state's classifications of its counties for purposes of a liquor tax, the Twenty-First Amendment affords some degree of support to the wide discretion which already exists.

CONCLUSION

The questions presented are not substantial, and the appeal should be dismissed. Alternatively, the judgment below should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served copy of the foregoing Motion to Dismiss or Affirm upon Mr. Herbert H. Gray, III and Mr. K. Morgan Varner, III, Varner, Stephens, Wingfield, McIntyre & Humphries, 1000 Grant Building, Atlanta, Georgia 30303, Attorneys for Appellants, William N. Griffin, B & B Beverage Co., Classic City Beverages, Inc., Georgia Crown Distributing Co., Northeast Sales Distributing, Inc., Premium Distributing Co., Inc. and Georgia Beer Wholesalers Association, Inc., and upon Mr. Edward E. Strain, III and Mr. Dennis T. Cathey, Cathey & Strain, P. O. Box 689, Cornelia, Georgia 30531, Attorneys for Appellants, Town of Baldwin and Town of Mount Airy, by mail, duly addressed and postage prepaid.

This _____ day of _____, 1982.

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Attorney for Appellees